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IN THE

Supreme Court of the United States

October Term, 1978.

No. 78-1547

SUN OIL COMPANY OF PENNSYLVANIA,
Petitioner,

v.

RAY MARSHALL, Secretary of Labor,
United States Department of Labor,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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SUN OIL COMPANY OF PENNSYLVANIA,
Petitioner,

v.

RAY MARSHALL, Secretary of Labor,
United States Department of Labor,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

The petitioner, Sun Oil Company of Pennsylvania, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on February 1, 1979.

OPINIONS BELOW.

The unreported findings and recommendations of the magistrate of the District Court for the Northern District of Oklahoma of November 4, 1975 appear in the Appendix hereto (App. A1-A10). The opinion of the District Court for the Northern District of Oklahoma of November 3, 1976 is reported unofficially at 17 FEP Cases 1577 and appears in the Appendix hereto (App. A11-A42).

The opinion of the United States Court of Appeals for the Tenth Circuit of February 1, 1979 is reported unofficially at 18 FEP Cases 1632 and appears in the Appendix hereto (App. A43-A49).

JURISDICTION.

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on February 1, 1979 (App. A50), and this petition for certiorari was filed within ninety (90) days of that date. A petition for rehearing and suggestion for rehearing en banc, although untimely, was ordered filed, considered and denied on March 9, 1979 (App. A51-A52). This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Where Congress directed the Secretary of Labor to engage in informal methods of conciliation before instituting any action under the Age Discrimination in Employment Act, 29 U. S. C. § 621 *et seq.*, in order to promote enforcement through conciliation rather than litigation whenever possible and where it is found that the Secretary did not engage in adequate conciliation before filing suit, may a district court dismiss an action brought by the Secretary under the statute?

STATUTE INVOLVED.

This case involves the interpretation and application of section 7(b) of the Age Discrimination in Employment Act, 29 U. S. C. § 626(b) (hereinafter "ADEA"), which provides:

> (b) The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

STATEMENT OF THE CASE.

This case raises the question of whether a district court may dismiss an action brought by the Secretary of Labor under the ADEA where the Secretary has failed to engage in adequate pre-suit conciliation required by section 7(b) of the ADEA, 29 U. S. C. § 626(b). Both the district court and court of appeals found that the Secretary's pre-suit conciliation efforts were inadequate but differed on the nature of the relief which should be granted as a result of this inadequacy.

The Department of Labor's involvement began in May, 1973 when Emory Osgood notified the Secretary of his intent to sue petitioner, Sun Oil Company of Pennsylvania ("Sun"), for allegedly forcing him to take early retirement in December, 1972 in violation of the ADEA. The Labor Department's compliance officer, J. Dean Speer, met with representatives of Sun in June, 1973 to discuss Osgood's case. Sun's representative, Robert Webster, explained that Osgood, who had been Regional Marketing Manager of Sun's Western Region, had been retired at age 56 because of poor performance and inability to adapt to the company's new management philosophy and had been replaced by W. W. Neddo who was 57 (App. A4, A13, A15-A17, A44).

Speer then conducted an investigation to explore the reasons given by Sun for Osgood's separation to see if there was some basis for further discussions (R. II at 26).[1] In furtherance of his inquiry concerning Osgood, Speer wrote to Webster on October 1, 1973 requesting additional information (name, positions, ages, etc.) concerning all of the individuals who were or had been part of the management structure in the marketing division of Sun since February, 1970. Webster supplied Speer with all of the

1. References are to the record in the court of appeals, citing the volume (R. I or R. II) and the page number.

requested information by letter dated October 25, 1973. The information was provided with respect to twenty-five individuals, including all seven of the individuals whose cases later became the subject of this action (App. A4-A5; R. II at 27-28, 35-36, 96-103).

In December, 1973, Speer notified Webster for the first time that the Labor Department believed remedial action in the form of re-employment or a cash settlement should be taken with respect to Osgood and another former employee, George Sokol. Sokol had not filed a notice of intent to sue, and Sun had not been previously informed Sokol's case was under investigation. When Webster would not agree to take the remedial actions suggested, Speer stated that the file would be forwarded to the Labor Department's legal office for analysis and a decision as to further action, and he sent the file to this office in December, 1973 (App. A5, A20, A44-A45).

In July, 1974, eight months later, Speer received the file back with advice and instructions with respect to additional information to be developed. Speer then continued his investigation and on October 23, 1974 met with Sun. During the period between December, 1973 and October 23, 1974, Speer had not been involved in any further conciliation efforts with Sun (App. A20-A21, A45).

At the October 23, 1974 meeting, Speer advised Webster that he had concluded from his investigation that Sun had engaged in age discrimination with respect to seven former marketing managers. Two of the seven were Osgood and Sokol. Speer had never previously informed Sun that the other five (Craig, Daniels,[2] McKee, Tolbert

2. James Daniels had filed an untimely notice of intent to sue with the Labor Department's Philadelphia regional office on May 21, 1974 (R. II at 51-52, 102). The Philadelphia regional office sent a letter to Sun Oil Company on May 29, 1974 advising it of Daniels' complaint and later transferred the matter to Speer to handle (R. II at 46-47, 52, 59-62). Speer never discussed Daniels' case with Sun before the October 23, 1974 meeting (App. A23).

and Holcomb) were the subject of his investigation or conciliation efforts (App. A6, A23, A45).

Speer asked if Sun would consider re-employment and backpay for the seven, but Webster answered that he did not have enough information about all of them to respond. Webster stated he would like to review the matter and would be prepared to discuss it with Speer after his review. Speer would not agree to further negotiations unless Sun agreed to waive the statute of limitations which would run with respect to some of the individuals on December 1, 1974. When Sun refused to consent to the waiver, the Secretary filed this action in the United States District Court for the Northern District of Oklahoma on November 27, 1974 alleging that Sun had engaged in age discrimination against the seven former employees. No further conciliation efforts were attempted by the Labor Department after the October 23, 1974 meeting, and the Secretary's representatives admittedly had not learned from or discussed with Sun the reasons for the actions taken with respect to all of the seven individuals before suit was filed (App. A6, A24-A29, A45).

On May 27, 1975, Sun filed a motion for summary judgment based on the Secretary's failure to comply with the pre-suit conciliation requirements of the ADEA. On November 4, 1975, following briefing and oral argument, Magistrate Morris L. Bradford filed findings and recommended that Sun's motion be granted and the action be dismissed [3] (App. A1-A10). On November 3, 1976, following additional briefing, Chief Judge Allen E. Barrow granted Sun's motion for summary judgment and dismissed the complaint with prejudice on the grounds that the court lacked subject matter jurisdiction or, in the alternative, the

3. Although the findings were prepared, at the magistrate's direction, by counsel for Sun, they incorporate the specific comments and rulings made by the magistrate at oral argument on October 22, 1975. *See e.g.*, App. A8-A9, ¶¶ 18 and 20.

complaint failed to state a claim upon which relief can be granted as a result of plaintiff's failure to comply with the statutory directive of attempting to effect voluntary compliance through informal methods of conciliation before filing suit [4] (App. A11-A42).

On appeal, notice of which was filed December 27, 1976, the Secretary raised two issues: (1) whether the Secretary's pre-suit conciliation efforts complied with section 7(b) of the ADEA, 29 U. S. C. § 626(b), and (2) if not, whether the district court should have stayed proceedings rather than dismissed the complaint. On February 1, 1979, the Court of Appeals for the Tenth Circuit concluded that the Secretary "failed to fully exhaust the informal enforcement avenues as contemplated by § 7(b)." (App. A47). However, the court held that the district court should have stayed proceedings until further conciliation efforts could be concluded rather than dismissed the action (App. A48-A49).

On March 9, 1979, the Court of Appeals for the Tenth Circuit denied Sun's petition for rehearing and suggestion for rehearing en banc (App. A51-A52).

4. R. C. Holcomb's claim was dismissed by the district court on the ground it was barred by the statute of limitations. No appeal was taken from this ruling by the Secretary, and "the dismissal as to Holcomb still stands." (App. A46 n. 1).

REASONS FOR GRANTING THE WRIT.

I. The Decision Below Is a Hindrance to the Effective Administration of the Conciliation Provisions of the ADEA.

The Tenth Circuit's opinion in this case raises an important issue concerning the remedies available to a district court when the Secretary of Labor fails to comply with the conciliation requirements of the ADEA before filing suit. The resolution of this issue has a significant impact on whether the congressional purpose of attempting to enforce the ADEA through informal methods of conciliation will succeed.

The ADEA places primary emphasis on conciliation by the Secretary, rather than litigation, to resolve disputes. *Burgett v. Cudahy Co.*, 361 F. Supp. 617, 621 (D. Kan. 1973). Resort to the conciliation process is required before either the Secretary or an individual may file an ADEA action.[5] With respect to actions brought by the Secretary, such as this case, section 7(b) of the statute provides:

> ". . . Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference and persuasion." 29 U. S. C. § 626(b).

5. With respect to suits by an individual, the ADEA requires that the individual must file a charge of age discrimination with the Secretary within 180 days of an alleged discriminatory act and provide the Secretary at least 60 days thereafter to "promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion" before a federal action may be filed. 29 U. S. C. § 626(d). A basic purpose behind the 180 day notice requirement is to provide the Secretary "with an opportunity to achieve a conciliation of the complaint while the complaint is still fresh." *Dartt v. Shell Oil Co.*, 539 F. 2d 1256, 1261 (10th Cir. 1976), *aff'd per curiam by an equally divided court*, 434 U. S. 99 (1977).

The legislative history of the ADEA emphasizes that the "most favored method of enforcement was conciliation and mediation." *Rogers v. Exxon Research and Engineering Co.*, 550 F. 2d 834, 841 (3d Cir. 1977), *cert. denied*, 434 U. S. 1022 (1978). The House Report on the ADEA states:

> "It is intended that the responsibility for enforcement vested in the Secretary by section 7, be initially and exhaustively directed through informal methods of conciliation, conference and persuasion *and formal methods applied only in the ultimate sense.*" H. R. No. 805, 90th Cong., 1st Sess., U. S. Code Cong. and Admin. News 2213, 2218 (1967) (emphasis added).

Both the district court and court of appeals concluded that the statutory mandate requiring the Secretary to engage in exhaustive conciliation efforts before filing an action had not been complied with in this case (App. A10, A41, A47). However, the court of appeals refused to sustain the district court's dismissal of the action on this ground, holding instead that the district court should have stayed the proceedings until conciliation could be concluded (App. A47-A49).

The Tenth Circuit's decision undermines and frustrates the statutory purpose of attempting to enforce the ADEA through informal methods of conciliation by the Secretary of Labor rather than through litigation in the federal courts. Instead of imposing any sanction for the Secretary's failure to comply with the pre-suit conciliation requirements of the ADEA, the decision of the court below allows the Labor Department to ignore its conciliation

responsibilities with impunity, thereby minimizing the opportunity for effective conciliation and placing the burden of enforcement on federal court litigation.

If conciliation efforts are to resolve disputes and avoid burdening the federal courts with litigation, these efforts must be undertaken promptly when disputes are fresh. The Labor Department must give the employer time to conduct internal investigations, formulate responses to individual charges as well as some opportunity to present its responses in negotiations with the Labor Department. *Brennan v. Ace Hardware Corp.*, 495 F. 2d 368, 374-375 (8th Cir. 1974); *Marshall v. Hartford Fire Insurance Co.*, 78 F. R. D. 97, 106 (D. Conn. 1978). Conciliation cannot be achieved where, as in this case, the Labor Department has information concerning all the individual cases for one year but does not inform the employer of the identity of all of the individuals on whose behalf the Department is seeking relief until one month before the statute of limitations is to expire and then will only engage in conciliation efforts if the employer waives the statute of limitations.

The longer the delay between the alleged act of discrimination and the efforts to resolve the charges, the less chance there is that the process of conciliation can achieve a satisfactory result for either the terminated employee (who continues without a job or backpay) or the employer (who is asked to reinstate an employee years after discharge and to pay ever increasing amounts of backpay). This is particularly true where, as in this case, the Labor Department is seeking re-employment and backpay for high level managers. A company simply cannot be expected to keep open or find such positions years after the employee has left the company, and the longer the delay in conducting conciliation efforts, the larger the backpay demanded. This is not the most productive atmosphere for attempting to reach a negotiated settlement.

If the statutory purpose of enforcement through conciliation rather than litigation is to have an opportunity for success, the conciliation requirements of the ADEA must be enforced by the courts in an effective manner. The most effective sanction is dismissal in appropriate cases because a stay of proceedings, as authorized by the Tenth Circuit, only serves to compound the delay which precludes constructive conciliation efforts.[6] Moreover, the pendency of a lawsuit alters the relationship and attitudes of the parties and tends to deter efforts at conciliation . *Cf. Johnson v. Railway Express Agency*, 421 U. S. 454, 461 (1975).

This case is an appropriate case for dismissal because the delay in conducting adequate conciliation was attributable solely to the dilatory conduct of the Labor Department which has never been explained or justified. Unless an appropriate sanction is authorized by this Court to discourage such conduct by the Labor Department and to promote the congressional purpose of conciliation, the Tenth Circuit decision may well cause the federal courts,

6. The 1978 amendments to the ADEA do not eliminate the need for effective sanctions in cases where the Secretary's conciliation efforts are unjustifiably inadequate. The amendments provide that when the Secretary is attempting to effect voluntary compliance through informal methods of conciliation, the statute of limitations shall be tolled for a period not to exceed one year. 29 U. S. C. § 626(e)(2), as amended. If, despite the additional time provided for conciliation, the Secretary still fails to comply with the statutory requirement, dismissal should be available as a sanction in appropriate cases in order to insure that the Secretary properly carries out his duties under the ADEA.

It should be noted that the 1978 amendments apply to "conciliations commenced by the Secretary of Labor after the date of enactment [of the amendments]" which was April 6, 1978, and therefore the amendments do not apply to this case. Age Discrimination in Employment Act of 1978, P. L. 95-256, § 4(c)(2) (April 6, 1978).

employers and the Secretary to be burdened with cases which might otherwise have been resolved had the Secretary been effectively encouraged to fulfill his obligations under the statute.

II. The Decision Below Is in Conflict in Principle with the Decision of Another Circuit Concerning the Propriety of Dismissing an ADEA Action Brought by the Secretary of Labor for Failure of the Secretary to Conduct Adequate Pre-Suit Conciliation.

The Tenth Circuit concluded that a stay of proceedings, rather than dismissal, was the appropriate remedy because the Secretary of Labor had made some effort to effect voluntary compliance before filing suit (App. A48-A49). The court of appeals justified this conclusion by noting that enforcement of the ADEA would be severely hampered if courts were to demand, upon penalty of dismissal, full compliance with a standard that the Secretary exhaustively seek informal compliance before filing suit (App. A47).

The reasoning and conclusion of the Tenth Circuit are in conflict with the decision of the Eighth Circuit in *Brennan v. Ace Hardware Corp.*, 495 F. 2d 368 (8th Cir. 1974). In *Ace Hardware*, the Eighth Circuit affirmed the dismissal of an action on the ground of inadequate pre-suit conciliation even though the Secretary had made some conciliation effort before suit and even though the dismissal was granted after a trial at which the employer was found to have violated the ADEA.[7] 495 F. 2d at 371, 374-375. The Eighth Circuit analyzed the ADEA and its legislative history and concluded that the provisions promoting voluntary compliance before legal action is initiated are an "integral part" of the ADEA which require the Secretary of Labor to initially use exhaustive, affirmative action to achieve conciliation. 495 F. 2d at 374.

> "Although the availability of and resort to courts allow for a method of resolving conflicts, the framework of a free people and the functioning of their government depends not essentially upon the courts, but upon the desire of the people to agree within the framework of their law and to compromise the differences outside the walls of a courtroom. The voluntary compliance provisions recognize this principle and also wisely perceive that conciliation is a difficult process in which exhaustive, affirmative action, in this situation initiated by the Secretary, is demanded to achieve resolution without the necessity of legal action." 495 F. 2d at 375.

The Eighth Circuit affirmed the lower court's finding that the pre-suit conciliation efforts by the Secretary did not

7. Other ADEA actions filed by the Secretary of Labor have been dismissed on the ground of inadequate pre-suit conciliation efforts by the Secretary: *Usery v. Sun Oil Co. (Delaware)*, 423 F. Supp. 125 (N. D. Texas 1976), *appeal docketed*, No. 77-1954 (5th Cir. May 9, 1977); *Dunlop v. Resource Sciences Corp.*, 410 F. Supp. 836 (N. D. Okla. 1976), *appeal dismissed on motion of Secretary of Labor sub. nom. Usery v. Resource Sciences Corp.*, No. 76-1426 (10th Cir. August 30, 1976).

Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, as amended, contains a provision which imposes pre-suit conciliation duties on the Equal Employment Opportunity Commission (EEOC) similar to those imposed on the Secretary of Labor under the ADEA. *Compare* 42 U. S. C. § 2000e-5(b) and (f)(1) *with* 29 U. S. C. § 626(b). Courts have dismissed actions brought by the EEOC under Title VII when the EEOC has failed to engage in adequate pre-suit conciliation. *Patterson v. American Tobacco Co.*, 535 F. 2d 257, 271-272 (4th Cir.), *cert. denied*, 429 U. S. 920 (1976); *Equal Employment Opportunity Commission v. Hickey-Mitchell Co.*, 507 F. 2d 944 (8th Cir. 1974); *Equal Employment Opportunity Commission v. United States Pipe and Foundry Co.*, 375 F. Supp. 237 (N. D. Alab. 1974); *Equal Employment Opportunity Commission v. Westvaco Corp.*, 372 F. Supp. 985 (D. Md. 1974).

"fulfill the affirmative burden of exhaustively employing informal methods to allow the Employer the opportunity to comply voluntarily with the Act." 495 F. 2d at 374-375.

In *Ace Hardware,* the Secretary of Labor argued that dismissal was inappropriate and that the district court "'should have stayed the proceedings to permit the Secretary to make necessary additional efforts toward effecting voluntary compliance.'" 495 F. 2d at 376. Although noting that the district court had the power to order such a stay, the court of appeals affirmed the dismissal stating:

> ". . . we think that § 626(b) invests a broad discretion in the District Court 'to grant such legal or equitable relief as may be appropriate to effectuate the purposes' of the Act. We cannot say that the District Court's failure to grant a stay of proceedings was an abuse of discretion, particularly in light of the express statutory provision of the Act requiring conciliation attempts before instituting legal action." 495 F. 2d at 376.

The Eighth Circuit's reasoning in *Ace Hardware* conflicts with the Tenth Circuit's holding that where the Secretary has made some effort to effect voluntary compliance before filing suit, even though these "efforts fell far short of what might reasonably be considered 'exhaustive,'" the proper course is to stay proceedings until conciliation can be concluded rather than dismiss the action (App. A49). The Eighth Circuit would leave to the district court the question of whether, under the circumstances of the conciliation efforts in each case, the statutory purpose of encouraging private settlement to avoid unnecessary litigation is best served by dismissing or staying a case where the Secretary's efforts are found to be inadequate. This Court should grant this petition for

certiorari in order to resolve the different conclusions of these two circuits with respect to the propriety of dismissing an action brought by the Secretary of Labor when the Secretary has failed to adequately comply with the pre-suit conciliation requirements of the ADEA.

CONCLUSION.

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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Dated: April 11, 1979

Appendix.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Civil Action No. 74-C-474

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,
Plaintiff,

v.

SUN OIL COMPANY OF PENNSYLVANIA,
a corporation,
Defendant.

FINDINGS AND RECOMMENDATIONS OF MAGISTRATE.

(Filed November 4, 1975)

This cause came on for hearing on this 22nd day of October, 1975, upon defendant's motion for summary judgment, at which time the plaintiff appeared by his attorney, Heriberto de Leon, and the defendant appeared by its attorney, Nancy J. Gellman.

The Magistrate finds:

1. This is an action brought by plaintiff, the Secretary of Labor (hereinafter "the Secretary") alleging that defendant Sun Oil Company of Pennsylvania (hereinafter "Sun") violated the Age Discrimination in Employment Act of 1967, 29 U. S. C. § 621 et seq. (hereinafter "the

Act") in connection with the retirement or discharge of seven individuals.

2. The seven individuals (James O. Craig, J. W. Daniels, R. C. Holcomb, John K. McKee, Emory Osgood, George Sokol, V. P. Tolbert) were all high level management employees in the marketing division of Sun who had held the position of Regional Marketing Manager or Assistant Regional Marketing Manager.

3. The Secretary's complaint alleges that this Court has jurisdiction pursuant to 29 U. S. C. § 626(b) and that plaintiff's representatives attempted to eliminate the alleged discriminatory practice and to effect voluntary compliance with the Act through informal means of conciliation, conference and persuasion before the action was instituted. (Complaint, ¶ 1).

4. In its Answer, Sun denies, inter alia, the allegations of jurisdiction on the ground that plaintiff did not satisfy the voluntary compliance requirements of the Act and raises lack of jurisdiction as an affirmative defense. Sun also asserts in its Answer that any cause of action plaintiff may have is barred in whole or in part by the applicable statute of limitations.

5. Sun filed Interrogatories—Set No. 1 and Request for Production—Set No. 1 which sought information concerning the Secretary's conciliation efforts. Plaintiff's answers established that such efforts were made by J. Dean Speer, who had been Assistant Area Director, Wage and Hour Division, Department of Labor, Tulsa, Oklahoma and by Heriberto de Leon, Attorney, Department of Labor. (Plaintiff's Answers to Defendant's Interrogatories—Set No. 1, Interrogatory No. 5). On April 21, 1975, Sun took the deposition of Mr. Speer, and the original deposition has been filed with and reviewed by the Court.

6. On May 27, 1975, Sun filed a motion for summary judgment which set forth two grounds: (a) the conciliation efforts of the Secretary do not satisfy the requirements of the Act necessary to confer jurisdiction in this Court, or, in the alternative, the Secretary has failed to state a claim upon which relief can be granted, 29 U. S. C. § 626 (b); and (b) any claim on behalf of R. C. Holcomb is barred by the Act's statute of limitations, 29 U. S. C. § 255, 626(e).

7. There are no genuine issues of material fact in the record before this Court with respect to defendant's motion for summary judgment.

8. The Act expressly directs the Secretary to attempt to effect voluntary compliance with the Act through informal methods of conciliation, conference and persuasion before any legal action is instituted. 29 U. S. C. § 626(b). The emphasis of the Act is on private settlement, and the Secretary has the responsibility to use exhaustive affirmative action to attempt to achieve conciliation before resorting to legal action. *Brennan v. Ace Hardware Corp.*, 495 F. 2d 368 (8th Cir. 1974); *Burgett v. Cudahy Corp.*, 361 F. Supp. 617, 621 (D. Kan. 1973); H. R. No. 805, 90th Cong., 1st Sess., U. S. Code Cong. and Admin. News, pp. 2213, 2218 (1967). The Act requires that such efforts are to be conducted promptly, consistent with the Act's two year statute of limitations for the filing of claims. 29 U. S. C. §§ 255, 626(e). The Secretary's failure to comply with the conciliation requirements of the Act has properly been held to justify dismissal of an action. *Brennan v. Ace Hardware Corp., supra; Brennan v. Approved Personnel Service, Inc.*, 8 EPD ¶ 9810 (M. D. N. Carolina 1974).

9. The record of the Secretary's compliance efforts in this case is a record of unjustifiable delays and failure to comprehensively explore resolution of the conflict which requires dismissal of this action. The involvement of the Department of Labor began with the receipt of a notice of intent to sue filed by Emory Osgood on May 29, 1973. On June 18, 1973, Speer met with Sun representatives, Kenneth Mosley and Robert A. Webster, to discuss Osgood's complaint. This was the only case Sun was advised of and the only case discussed by Speer. The Sun representatives explained that Osgood, who had been Regional Marketing Manager (Western Region), had been retired early by Sun at age 55 because of poor performance and inability to conform to the company's new management style and had been replaced by W. W. Neddo who was 57. The Sun representatives also explained the 1970 reorganization of the marketing division of Sun Oil Company, a New Jersey corporation, and the 1972 reorganization of defendant's marketing division. During this explanation, Webster identified at least 14 individuals and their positions within the marketing division, including four who are the subject of the present action (Osgood, Sokol, Tolbert and McKee) The Sun representatives cooperated with Speer and indicated that they were willing to meet and discuss the matter with Speer again. Speer was to investigate the matter further.

10. On October 1, 1973, Speer wrote to Webster requesting additional information (names, positions, ages, premerger status, replacements) concerning the management structure in the marketing division of Sun beginning February, 1970. By letter dated October 25, 1973, Webster promptly supplied all the requested information concerning 25 individuals, including the seven whose cases are the

subject matter of this action. Therefore, by at least the end of October, 1973, the Secretary was aware of the identity of these seven individuals, their age and positions with Sun, the actions taken by Sun with respect to their employment, and the Secretary had the same information with respect to all individuals who held comparable positions to the seven in the marketing division since February, 1970. However, the Secretary did not notify Sun that individuals other than Osgood were the subject of his investigation or conciliation efforts.

11. In early December, 1973, Speer contacted Webster and stated he felt some action should be taken by Sun with respect to Osgood and George Sokol. This was the first time Speer discussed Sokol, and Webster told Speer he was surprised by the mention of Sokol. Speer testified that he requested that Sun consider either reemployment or a cash settlement with respect to Osgood and Sokol. Even accepting Speer's testimony that Webster stated unequivocally that Sun would not take any action with respect to Osgood or Sokol in December, 1973, one telephone conversation during which an employer is informed for the first time that the Secretary is investigating the termination of an employee cannot satisfy the exhaustive and affirmative conciliation efforts required of the Secretary by the Act.

12. Speer sent the file to the Solicitor's Office in December, 1973. Eight months later, in early August, 1974, Speer received the file back from the Solicitor's Office with instructions to develop certain additional information. Speer had not been involved in the case in any respect between December, 1973 and August, 1974 and during this period there was no further contact with Sun. Speer did not contact Sun when he received the file back from

the Solicitor's Office. He did interview approximately eight individuals and advised the Solicitor's Office of the completion of his investigation sometime after October 15, 1974. Speer then telephoned Webster and told him that he had completed an investigation limited to regional marketing managers and former assistant regional marketing managers and requested a meeting with Webster to discuss the findings of the investigation. Speer did not advise Webster over the telephone as to what his findings were.

13. On October 23, 1974, Speer and Heriberto de Leon, an attorney with the Solicitor's Office of the Department of Labor, met with Webster. Speer advised Webster that he had concluded from his investigation that Sun had engaged in age discrimination with respect to seven former regional marketing managers and assistant regional marketing managers. Speer gave Webster the names of the seven individuals. Two of the seven were Osgood and Sokol. Speer had not previously informed Sun that the other five (Craig, Daniels, Holcomb, McKee and Tolbert) were the subject of Speer's investigation or conciliation efforts. Webster told Speer he could not discuss all of the individual cases at the October 23 meeting as he did not have information concerning all of them. Webster asked for time to review the matter and stated he wanted to discuss the matter with Speer after his review. Speer would only agree to continue conciliation efforts if Sun would agree to waive the Act's statute of limitations which Speer and de Leon contended would begin to run with respect to some of the claims on December 1, 1974. Webster stated he had no authority to agree to such a waiver and would have to consult with Sun's general counsel.

14. On November 13, 1974, Speer called Webster, at which time Webster informed Speer that Sun would not

agree to waive the statute of limitations. No further conciliation efforts were attempted or suggested by Speer or de Leon, and neither Speer nor de Leon contacted Sun following this conversation. The complaint in this action was filed on November 27, 1974.

15. At no time during the October 23, 1974 meeting or subsequent contacts between Webster and Speer did Webster state that Sun was unwilling to continue conciliation efforts with respect to all of the seven former employees. However, Speer and de Leon told Webster that the Department would not continue the conciliation efforts unless Sun waived the statute of limitations. Prior to the filing of this action, Speer and de Leon had not learned from or discussed with representatives of Sun Sun's position concerning the reasons for the action taken with respect to all of the seven former employees.

16. The Act's two year statute of limitations became a factor in this case as a result of the Secretary's unjustifiable delay in permitting the matter to lay dormant for at least eight months. Sun had voluntarily provided the Secretary with information concerning the seven, among others, in October, 1973; however, the Secretary did not inform Sun until October, 1974 that all seven were the subject of the Department's investigation and conciliation efforts. Without even affording Sun the opportunity it requested to review the cases it was first advised of at the October 23, 1974 meeting and to discuss possible resolution of all the cases with the Secretary, the Secretary demanded that Sun waive its rights under the Act or the Secretary would not continue conciliation efforts.

17. The claims asserted by the Secretary on behalf of the seven former employees were separate and distinct. Notice and consideration of Osgood's case, for example,

did not constitute notice or consideration by Sun of the cases of the other individuals and any response by Sun with respect to one case did not foreclose a different response with respect to the other individuals. Moreover, Osgood's case was considered at the October 23, 1974 meeting along with the other cases, and Sun did not state it would not negotiate further with respect to the seven. As a result of his delay in raising the claims and his refusal to discuss conciliation after the October 23 meeting, the Secretary failed to carry out his obligation to fully explore conciliation with respect to each of the seven cases.

18. Sun was prejudiced by the Secretary's failure to comply with the conciliation requirements of the Act. Unless conciliation efforts are undertaken promptly, both the employer's and employee's situations can be altered so that certain types of settlements may be precluded (e.g., re-employment which is sought by the Secretary in this case). A corporation the size of Sun simply cannot be expected to keep open or find high level management positions for individuals on whose behalf claims of improper discharge are first raised several years after they have left the company. Moreover, the more time that elapses between the alleged unlawful occurrence and the conciliation efforts, the more difficult the Act's favored resolution through conciliation may become as memories fade, and participants in the events scatter.

19. When the Secretary has complied with the conciliation requirements of the Act, he had been able to resolve a high percentage of cases under the Act through such informal methods and without resort to the courts. *Brennan v. Ace Hardware, supra,* 495 F. 2d at 374-75.

20. Although under certain circumstances, it would be appropriate for a court to enter a stay to permit additional conciliation efforts, this is not an appropriate result in this case. The government had its day and failed to fulfill its obligation to defendant to promptly, intelligently and exhaustively explore conciliation with respect to the seven. The Secretary's failure to carry out his responsibilities under the Act has prejudiced Sun and a stay cannot eliminate or minimize this prejudice.

21. The Act's statute of limitations provides:

> "Any action . . . may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued." 29 U. S. C. § 255, 625(e).

The Complaint was filed on November 27, 1974. R. C. Holcomb was retired by defendant on September 1, 1971. (Plaintiff's Answers to Defendant's Interrogatories—Set No. 1, Interrogatory No. 1).

22. The date of discharge is the controlling date under the Act's statute of limitations and a charge of age discrimination must be filed in relation to that date. Termination of employment does not constitute a "continuing violation of the Act. *Olson v. Rembrandt Printing Co.,* 511 F. 2d 1228, 1234 (8th Cir. 1975); *c.f. Law v. United Air Lines, Inc.,* 519 F. 2d 170, 171 (10th Cir. 1975). Therefore, even if the Act's three year statute of limitations is applicable, the claim for violation of the Act with respect to R. C. Holcomb was filed more than three years after Holcomb was retired and accordingly is barred by the statute of limitations.

RECOMMENDATION

The Magistrate recommends to the Court that defendant's motion for summary judgment be granted and the action be dismissed with prejudice on the grounds that:

(1) this Court lacks subject matter jurisdiction or, in the alternative, the complaint fails to state a claim upon which relief can be granted as a result of plaintiff's failure to comply with the statutory directive of attempting to effect voluntary compliance through informal methods of conciliation, conference and persuasion pursuant to 29 U. S. C. § 626(b) before instituting this action; and

(2) the applicable statute of limitations, 29 U. S. C. §§ 225, 626(e), bars any action or relief on behalf of R. C. Holcomb.

Dated this 4th day of November, 1975.

/s/ MORRIS L. BRADFORD
United States Magistrate

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

74-C-474-B.

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,
Plaintiff,

v.

SUN OIL COMPANY OF PENNSYLVANIA,
a corporation,
Defendant.

MEMORANDUM AND ORDER OF THE COURT.

(Filed November 3, 1976)

The Court has for consideration the defendant's Motion for Summary Judgment, filed pursuant to Rule 56 of the Federal Rules of Civil Procedure, and has carefully perused the entire file, including all pleadings, plaintiff's responses to defendant's discovery requests, the deposition of J. Dean Speer, filed of record, and, being fully advised in the premises, finds:

Defendant's Motion for Summary Judgment raises two grounds for consideration by the Court, i.e.:

1. That this Court lacks subject matter jurisdiction or, in the alternative, the complaint fails to state a claim upon which relief can be granted as a result of plaintiff's failure to comply with the statutory directive of attempting to

effect voluntary compliance through informal methods of conciliation, conference and persuasion pursuant to 29 U. S. C. § 626(b) before instituting this action; and

2. That the applicable statute of limitations, 29 U. S. C. §§ 255, 626(e) bars any action or relief on behalf of R. C. Holcomb.

The instant litigation was commenced on November 27, 1974, by the Secretary of Labor (hereinafter referred to as "Secretary"), under the Age Discrimination in Employment Act of 1967, 29 U. S. C. § 621, et seq. (hereinafter referred to as "Act").

In the Complaint, the Secretary alleges that since *November 25, 1971,** the defendant, Sun Oil Company of Pennsylvania (hereinafter called "Sun"), has wilfully violated and continues to wilfully violate the provisions of the "Age Discrimination in Employment Act of 1967". The Secretary further alleges that this action was commenced after the Secretary's representatives had attempted to eliminate the alleged discriminatory practice or practices through informal methods of conciliation, conference and persuasion, pursuant to the Act.

The file reveals that seven individuals who are former employees of the defendant form the nexus of the present controversy. They are James O. Craig; J. W. Daniels; R. C. Holcomb; John K. McKee; Emory Osgood; George Sokol; and V. P. Tolbert. Attached to the deposition of J. Dean Speer, taken April 21, 1975, is a copy of a document designated "Sunoco Retail Marketing Organization Beginning February 1, 1970", which appears to give certain pertinent information concerning 25 individuals (7 of whom are listed hereinabove). At this juncture, in considering defendant's Motion for Summary Judgment, the Court will deal only with the seven individuals delineated hereinabove.

* Note: The Secretary alleges violation since November 25, 1971, and Mr. Holcomb was terminated September 1, 1971, some months prior to the November date alleged by the Secretary.

James O. Craig is listed as J. O. Craig, and he is indicated as being the Assistant Regional Manager, N. E. Region, Framingham, Massachusetts. His age is reflected as 47 and he was terminated on *December 9, 1972*, with the notation "job eliminated".

J. W. Daniels is indicated as Assistant Regional Manager, Middle Atlantic Region, Valley Forge, Pennsylvania. His age is reflected as 60 and he was terminated on *December 1, 1972*, with the notation "job eliminated".

R. C. Holcomb is listed as Assistant Regional Manager, N. E. Region, Framingham, Massachusetts. His age is reflected as 62 and he was terminated on September 1, 1971,* with the notation "job eliminated".

John K. McKee is listed as J. K. McKee, and he is indicated as being the Regional Manager, Central Region, Pittsburgh, Pennsylvania. His age is reflected as 56 and he was retired on *December 1, 1972*, and replaced by C. L. Hodsdon, age 55.

Emory Osgood is listed as E. M. Osgood, and he is indicated as being the Regional Manager, Western Region, Tulsa, Oklahoma. His age is reflected as 56 and he was retired on *December 1, 1972*, and replaced by W. W. Neddo, age 57.

George Sokol is listed as G. O. Sokol, and he is indicated as being Assistant Regional Manager, Western Region, Tulsa, Oklahoma. His age is reflected as being 54 and he was terminated on *February 28, 1973*, with the notation "job eliminated".

* Note: The Secretary alleges violation since November 25, 1971, and Mr. Holcomb was terminated September 1, 1971, some months prior to the November date alleged by the Secretary.

V. P. Tolbert is indicated as Regional Manager, Ohio Valley Region, Cincinnati, Ohio. His age is reflected as 55 and he was retired on *August 1, 1973*, with the notation "Ohio Valley Reg. went out of existence, job eliminated".

Turning now to the deposition of J. Dean Speer, taken April 21, 1975, he testified that he was presently the Area Director for Wage Hour in Little Rock, Arkansas (Dep. 5) and at the time involved in this litigation was the Assistant Area Director, Wage Hour, in Tulsa, Oklahoma (Dep. 5).

Commencing at page 8, he testified:

> Q. Would you explain your understanding of the Act's requirement concerning efforts to achieve voluntary compliance through informal methods of conciliation, conference and persuasion? What is your understanding of what is to be done?
>
> A. Well, I think it is just exactly what it says. I think an opportunity is to be given the employer to remedy a given situation without having to agree or admit, if you will, that any discriminatory act has taken place. I think this is what the Act means by conciliation. If you get into a posture of what I refer to as 'finger pointing', you then place the employer in a posture of having to admit a wrong doing if one did exist.
>
> In a conciliation effort, I attempt to advise the employer that I am not interested in determining guilt or lack thereof. I am only interested in resolving a particular situation and I am there to see if we possibly can reach some middle ground that we would be (sic) somewhat satisfactory to the employer as well as to the employee—a conciliatory effort.
>
> I think once you depart from there into the area of conference and persuasion in the event the conciliation effort fails and the employer indicates that he is not so disposed to make any attempts to reach middle ground, you must then enter some type of fact finding phase—or if I feel that at least there is a prima facie indication of possible non-compliance—and try to determine to some extent what happened.
>
> If the employer remains adamant in his position that he has done nothing improper and does not intend to make any changes in the actions that he has taken, I feel you have to continue to confer with him or advise him periodically of where you are, what you found, listening to any information that he wants to submit to you that might clarify or alter any findings or opinions that you may have formed at that point.
>
> This procedure is on-going until such time as you reach the point where there is nothing more to discuss, all has been said and we—or I— may have come to the conclusion that these discriminations did take place. Again, the employer remains adamant in his position that he is not going to make any changes and at that point the only thing I think you can do is advise him that you feel there has been a violative situation and in the event you can't reach agreement on some terms, then you would have to submit the file to other locations, to the Area Director or to the Solicitor's Office is (sic) that is warranted, for any further actions they feel are necessary.

At page 14 of the deposition, Mr. Speer testified that his initial contact with the defendant, Sun, was made by letter dated *May 31, 1973*, to Mr. Ken Mosly (letter attached to deposition). In pertinent part the letter stated:

> "This is to notify you that Emory M. Osgood has advised me that he intends to bring suit against Sun

Oil Company of Pennsylvania to seek relief from an alleged discriminatory practice under the Age discrimination in Employment Act of 1967.

"° ° ° I will call at your establishment at 9:00 a.m. on June 5, 1973, to review the circumstances involved in this case and, if possible, to work out some solution consistent with the statute and agreeable to the parties. ° ° °."

Mr. Speer testified (Dep. 16) that he did not meet with Mr. Mosly or other officials of defendant on June 5, 1973, but that *the first meeting was June 18, 1973 and that prior to said meeting no investigation was conducted* (Dep. 17). *His discussion with the Sun officials was limited to Mr. Osgood's case in June of 1973* (Dep. 18).

Commencing at page 19, Mr. Speer testified:

Q. I believe you stated that before the June 18th meeting that you had not conducted any investigation. Yet you stated that you had talked to Mr. Osgood. Is 'investigation' a term of art in the Wage Hour Division?

A. Well, yes, *I had contacted Mr. Osgood. I had received his Notice of Intent to Sue.* The contact was made with Mr. Osgood to ascertain the background behind his filing of the Notice of Intent to Sue. Of course, before I can go to a company and enter into any conciliatory effort, I must know what the employee or the parties filing the intent to sue are interested in in order to resolve the potential litigation between the two parties.

Contact was made with Mr. Osgood and I did discuss with him his salary. That's how I knew he received the severance pay, what he was interested in, the damage he felt he had incurred as a result of

Sun's action, so that I could go to the company and listen to their side and hopefully enter into negotiations to resolve the differences between the two.

Q. *Other than your contact with Mr. Osgood, had you done anything else before the June 18th meeting?*

A. *No.*

In discussing a four page document, attached to the deposition, which constitute notes that Mr. Speer made during the June 18th, 1973, meeting, Mr. Speer testified, commencing at page 23:

Q. Also on page 3, there are references to several other individuals: Mr. Sokol, S-o-k-o-l (spelling); Mr. Neddo, N-e-d-d-o (spelling); Mr. Tolbert, T-o-l-b-e-r-t (spelling), and Mr. McKee and Mr. Hodson.

Do you recall how these individuals' names came up; what the discussion was?

A. Yes. In the company's explanation to me of events surrounding Mr. Osgood, ° ° °.

At pages 25 and 26 of the deposition, he testified:

Q. *Do you remember about how long this meeting lasted? Was it a couple of hours?*

A. *I would say approximately two hours.*

Q. *And would you say that Sun was cooperating with you in providing all this information?*

A. *Yes.*

and he further testified, on page 26:

Q. *Did Sun indicate it was willing to meet with you and discuss this further?*

A. *Yes.*

Q. *Did you request any additional information from Sun at that time?*

A. *No, not at that time. Nothing other than the documentation they had already furnished me.*

In discussing a letter dated *October 1, 1973*, from Mr. Speer to Mr. Webster of Sun, Mr. Speer testified:

Q. *Mr. Speer, had you any other contact with Sun before you sent this letter on October 1, 1973, other than the June 18, 1973 meeting?*

A. *No.*

Q. *Were there any phone conversations that you recall?*

A. *No.* I think the parameters for gaining additional information had been established during the discussion of June 18th in that Mr. Webster asked that any subsequent discussions be undertaken with him. He further indicated at that time, as did Mr. Mosly, as a result of my initial letter, I believe, dated May 31, that any personnel records with respect to management people such as Mr. Osgood would be maintained in the home office and if I desired those I would have to obtain them from that particular location.

and at page 29:

Q. Well, this letter starts out by saying, 'this refers to our discussions of the alleged illegal discrimination with respect to the termination of Emory Osgood', and so on.

I am simply wondering whether there were other discussions after the June 18th meeting that you know of?

A. *No. I think that I might want to clarify that. I do think that I telephoned Mr. Webster and advised him that I was writing the letter and the type of information that I would be seeking and that I would be providing him with a format, but there wasn't any discussion of the validity or invalidity or any further expansion of the company's position or anything of this nature. It was just a conversation indicating that this was coming.*

On page 31 Mr. Speer testified:

Q. *To your knowledge had Mr. Sokol filed the Notice To Sue Letter as of October, '73?*

A. *To my knowledge, no.*

Q. *Do you know whether he ever filed a Notice To Sue Letter?*

A. *To my knowledge, no.*

and further:

Q. Again, referring to Defendant's Exhibit Three, in your letter you state that, 'During our last conversation you have indicated that Sun Oil Company is not prepared at this time to make any changes in the actions already taken.'

I take it that you're referring here to the June 18th meeting?

A. Yes.

Q. And the action taken with respect to Mr. Osgood?

A. Yes.

Q. *Had you told Sun as of October 1, '73 that there had been a violation of the Age Discrimination Act?*

A. *No. I don't think so. I feel reasonably sure that I did not make any statement to the effect that 'you have violated the Age Discrimination Act.' We were still in conciliatory posture at that time.*

At page 35 of the deposition Mr. Speer indicated that *he sent the file to Mr. de Leon's Office (Solicitor's attorney) sometime in December of 1973.* At page 36 he testified:

Q. Did you conduct any further investigations by talking to other people?

A. Only to Mr. Osgood and Mr. Sokol.

Q. *Did you have any further contact with representatives of Sun after receiving this October 25th letter?*

A. *Yes. I contacted Mr. Webster in early December of 1973 and indicated to him that I felt some remedial action should be taken with respect to Mr. Osgood and Mr. Sokol. During that discussion, he indicated some surprise at the mention of Mr. Sokol.*

When asked for the company's reasons for the decision with respect to Mr. Sokol, he made the statement that it was their decision that Mr. Sokol simply would not perform in the new position "*".

At page 37 he testified that *this was the first time (early in December of 1973) that he had discussed Mr. Sokol's situation with any representative of Sun, and it was in a phone conversation.*

Mr. Speer testified, commencing at page 38, that in the December telephone conversation he thought he advised Sun that in cases involving involuntary retirement that they were required to submit them to the Solicitor's Office for analysis and the like. At page 39 *he indicated he received the file back from the "Solicitor's office in July of 1974"—having been sent in December of 1973.* In further response to questions, he then testified:

Q. *During that period were you involved in the case in any respect?* (Referring to the period between December of 1973 when the file was sent and July of 1974 when it was returned—this is comment by the Court.)

A. *No.*

Q. *Were you in contact at all with the Solicitor's Office during this period concerning the file?*

A. *No.*

Q. *You were not conducting any further investigation?*

A. *No.*

Mr. Speer testified that *the file came back from the Solicitor's Office in July of 1974 (letter of transmittal dated July 31, 1974)* with advice and instructions with respect to additional information that the attorneys wanted to develop and Mr. Speer undertook this task. (Dep. 39 and 40). He testified, commencing at page 45, with reference to the contact he made after receiving the file back:

Q. Were you contacting these other individuals with respect to the claims of Mr. Sokol and Mr. Osgood?

A. In part, yes.

Q. In part with respect to claims concerning other individuals?

A. No. Not with respect to claims of other individuals, but with respect to similar actions taken by the company as indicated by material submitted by Mr. Webster to clarify what the circumstances were with regard to those individuals.

If I may make a correction, I don't know how far back we would have to go to make it. You indicated or you asked me—During the period of time between the June 18th discussion with Mr. Webster and the letter to him asking for the information if I had contacted other than Mr. Osgood. I believe I indicated that another individual came forward. I did contact, make a direct contact with one other person. That was brought to my recollection as a result of going

through some of my documents here. I did contact one other person.

Q. Is that a person who made a contact to the Department?

A. No.

Q. So it was Mr. Osgood and another unidentified individual that you contacted before October?

A. Mr. Osgood and two other ones.

Q. Two other ones. All right.

A. Right.

Q. Now, after October 15, 1974, you completed your discussions with eight or so individuals. What did you do next?

A. I advised the Solicitor's Office I had completed the work they had asked me to do.

Q. Who did you advise?

A. Herb de Leon.

Q. Did you sent the file back?

A. No.

Q. *Did you do anything further in this case after you advised Mr. de Leon?*

A. *Yes, I got in touch with Mr. Webster and asked for a conference with him.*

Q. *Did you contact him by telephone?*

A. *Yes.*

Q. Did you simply ask for a conference or did you discuss anything—

A. No. I indicated to him that we had completed an investigation limited to the Regional Marketing Managers and the former Assistant Regional Marketing Managers and that we wished—that we desired a conference with him to discuss the findings.

Q. *You didn't tell him over the phone what your findings were?*

A. *No.*

Q. Is it a correct characterization of your investigation that subsequent to July 31 that it was an investigation limited to Regional Marketing Managers and former Assistant Regional Marketing Managers?

A. Yes.

Q. *When was the meeting set up?*

A. *For October the 23rd of 1974.*

At this meeting, which took place in Dallas, Texas, *Mr. Speer testified that he advised Sun of his findings to the "extent that the company had engaged in age discrimination with respect to individuals in the positions named."* He testified that he advised of the names of the individuals and, again, asked if they could come to some resolution of the findings.

On page 49, still discussing the meeting in Dallas, Texas, on October 23, 1974, Mr. Speer testified:

Q. Could you tell me what you told Mr. Webster with respect to your findings? First, you stated you advised him of the names of individuals that you felt had been discharged in violation of the Act; is that correct?

A. Yes.

Q. Who were those individuals?

A. Those individuals named in the Summary of Unpaid Wages contained in Exhibit Five.

Q. *Seven individuals?*

A. *Yes.*

Q. *So there were five individuals in addition to Mr. Osgood and Mr. Sokol?*

A. *Yes.*

Q. *Was this the first time that you had advised Sun that you were conducting any investigation with respect to those five individuals?*

A. *Yes.*

At the bottom of page 50 he testified:

Q. Did you discuss the cases of the seven individuals separately or was it a general description such as you have just given me?

A. Some of them were discussed individually. Mr. Webster indicated he was not in a position to discuss the others.

Q. Do you recall who was discussed individually and who Mr. Webster said that he could not discuss?

A. No, I don't.

Q. Did Mr. Webster indicate why he felt he was not in a position to discuss some of the individuals?

A. Because he did not have the information at hand.

Q. Had any of the other six individuals, other than Mr. Osgood, filed a Notice of Intent to Sue with the Department of Labor?

A. With the Department of Labor?

Q. The Secretary.

OFF THE RECORD DISCUSSION

Then the witness, Mr. Speer said, yes. Picking up the questions and answers at page 52 of the deposition:

Q. Who had filed a Notice To Sue?

A. James Daniels.

Mr. Speer then testified that the Notice To Sue of James Daniels was filed May 21, 1974, in Philadelphia and that the Philadelphia regional office notified Sun in Philadelphia on May 29, 1974, and that said notice was addressed to "Sun Oil Company". Continuing with a discussion of the meeting in Dallas, Texas, in October, 1974, Mr. Speer testified, commencing at page 53 of the deposition:

Q. After you described your findings to Mr. Webster and discussed some of these cases individually, what happened at the meeting, if anything further?

A. *We asked Mr. Webster or I asked Mr. Webster if he would be agreeable to making some resolution of these cases. I specifically asked if he would consider re-employment of the seven individuals in question, and that he consider compensation for damages through lost income that these individuals suffered during the period of time that they had been displaced from Sun.*

Mr. Speer then testified:

Q. Did Mr. Webster respond to your statement concerning re-employment damages?

A. He indicated at that time he was not in a position to enter into any agreements with us—including myself and Mr. de Leon, who was present at the conference. We indicated that—he indicated that he would like to go back and review the matter and discuss it with us at some subsequent period. We advised Mr. Webster that the running of the Statute of Limitations was to begin with respect to a number of these individuals and that we were perfectly willing to continue in negotiations with he or someone else in Sun Oil Company if Sun would provide us with a waiver of Statute of Limitations so as not to further erode any compensations that the employee might be entitled to.

Q. What date were you talking about in terms of the imminent running of the Statute of Limitations?

A. The Statute would begin running, I believe, on November 1st—December 1st. December 1st of '74.

Q. What was Mr. Webster's response?

A. That he did not have the authority to waive the Statute on behalf of Sun and that he would have to discuss it with general counsel for Sun Oil Company and that he would provide us with an answer in five days.

Q. Did you tell Mr. Webster that because of the Statute of Limitations, you did not have time to conciliate with respect to five individuals who were first mentioned at this meeting?

A. No.

The October meeting lasted approximately an hour or an hour an a half. (Dep. 56).

Mr. Speer then testified:

Q. *What happened following the meeting with respect to the Statute of Limitations?*

A. *Not having heard from Mr. Webster, I contacted him on the 5th of November.*

Q. *This is by telephone?*

A. *Yes. At that time he indicated he had not received a reply from the general counsel as to whether or not Sun would agree to waive the Statute.*

Q. *Is that the substance of the whole conversation?*

A. *Yes. I simply called to ask or contacted him by telephone to ascertain what Sun's position was going to be. On November 13th, again, not having heard from Mr. Webster, I contacted him and he advised me that he had received an answer from general counsel that they would not agree to the waiver of the Statute to facilitate further negotiations for conciliation.*

Q. *Did you discuss anything further with him?*

A. *No. Other than I would refer the file back to the Solicitor's Office as we had advised him at the time—There was one other thing. During the conversation on October 23rd, we advised Mr. Webster that if we could not reach some agreement for a waiver of Statute that the file would be submitted to the Solicitor's Office and assuming that everyone agreed, the suit would be entered.*

Q. In the October meeting and subsequent phone calls, did Mr. Webster at any point indicate that Sun would be unwilling to consider conciliation efforts with respect to the seven individuals?

A. Well, I feel he did so indicate when he would not agree to the waiver of Statute in that it would erode the compensation due the individuals: That we were perfectly willing to enter further conciliatory efforts or negotiations—whichever terminology you want to use—if Sun were agreeable to doing so.

By refusing to waive the Statute, I think it was an indication that Sun was refusing to negotiate.

Q. Did Mr. Webster tell you directly that Sun would not consider negotiating further with respect to all or some of the individuals?

A. No.

Q. You told Mr. Webster that if Sun would not waive the Statute, then the suit would be filed?

A. Well, I think that's a little, rather harsh way to put it. I don't think it was ever phrased to him in exactly that terminology. I think the same message was given to Mr. Webster by Mr. de Leon representing the Solicitor's Office.

Q. The same message that if——

A. That if we could not enter into negotiations and through the waiver of the Statute that the file

would be submitted to the Solicitor's Office and we would consider filing a lawsuit.

Q. Did Mr. Webster explain in any way Sun's decision not to waive the Statute of Limitations?

A. No.

Q. Is it a fair summary to say that except for Mr. Osgood and Mr. Sokol that Sun was first notified of the Defendants' (sic) investigation with respect to Mr. Craig, Mr. Daniels, Mr. Holcomb, Mr. McKee and Mr. Tolbert at the October 23rd, '74 meeting?

A. It may be a fair description of my contact with Sun Oil Company with respect to these individuals in the course of—well, the case with respect to James Daniels and in his notice of intent to sue had previously been discussed with Mr. Webster.

Q. But not by you?

A. Not by me. At that time, as a result of that discussion, Mr. Webster indicated that he did not want to discuss that case any further. There was an inquiry or an investigation, if you will, initiated by the Philadelphia office in which some of these people were also involved. And as a result of discussions between myself and the Compliance Officer in Philadelphia and to avoid an overlap type situation, he agreed to divorce from his inquiries with respect to these individuals any actions that I was taking in my case.

Sun was aware that an investigation was taking place with respect to the Marketing Department.

He further testified, commencing at page 60:

Q. Do you know which individuals he had been in contact with Sun about?

A. He was looking at the Marketing Division of Sun Oil Company as a whole and had requested specific information with respect to personnel files,

personnel actions and this type of thing that had transpired since the reorganization began, which was in 1972 and '73.

In response to a question propounded to Mr. Speer as to whether he knew when Mr. Johnson's activities (Compliance Officer in Philadelphia) began, Mr. Speer replied that he was just aware that he was making an investigation in Philadelphia and he did not know if his investigation included contact with Sun concerning conciliation efforts. He further testified that Mr. Johnson's investigation was apparently broader than Mr. Speer's investigation.

Mr. Speer testified, commencing at page 62 of the deposition:

Q. I believe you stated that in the October 23, '74 meeting, that Mr. Webster indicated that he was not at that time in a position to discuss some of the seven individuals because he did not know enough about their situations; is that correct?

A. Yes.

Q. Was this subject ever picked up again? Did you ever have any further conversations with Mr. Webster about Sun's position with respect to those individuals?

A. No. If you are talking about some subsequent date——

Q. Before the suit was filed.

A. No. The issue between that conference and the time I submitted the file back to Mr. de Leon's office was whether or not Sun would agree to the waiver of the Statute.

Q. You didn't know what Sun's position was with respect to at least some of the seven individuals before the suit was filed?

A. That's correct.

To summarize, a chronological delineation of pertinent dates and events are as follows:

May 29, 1973 Emory Osgood filed his Notice of Intent to Sue with the Department of Labor.

May 31, 1973 Letter from J. Dean Speer, Assistant Area Director, Wage Hour, Tulsa, Oklahoma, to Sun Oil Company requesting a conference for June 5, 1973.

June 18, 1973 Conference between J. Dean Speer and Sun Oil Company representatives, Robert Webster and Ken Mosly. Only former employee discussed was Emory Osgood. Meeting lasted about two hours.

October 1, 1973 Letter by Mr. Speer to Mr. Webster seeking additional information. Mr. Speer testified he might have telephoned Mr. Webster and told him that he was writing the letter.

October 25, 1973 Letter from Mr. Webster to Mr. Speer furnishing information requested in letter of October 1, 1973.

December, 1973 Mr. Sokol, former employee, entered the picture when Mr. Speer contacted Mr. Webster and Mr. Speer first brought up Mr. Sokol's name.

December, 1973 Mr. Speer sent file to the Solicitor's Office.

July 31, 1974 Transmittal letter sending file from Solicitor's Office to Mr. Speer.

October, 1974 Mr. Speer contacted Mr. Webster at Sun to set up a conference in Dallas, Texas.

October 23, 1974 Conference in Dallas, Texas. Present were Mr. Webster, Mr. Speer, and Mr. de Leon. It was at this meeting that seven individual's names were brought up, including the names of Messrs. Osgood and Sokol. The only other individual, beside Mr. Osgood, who filed a Notice of Intent to Sue was Mr. James Daniels, whose notice was dated May 29, 1974, and was filed in Philadelphia. His notice was handled by a Regional Compliance Officer there and the letter was sent to "Sun" in Philadelphia. It was at this meeting that Mr. Webster was requested to waive the Statute of Limitations on behalf of Sun.

November 5, 1974 Telephone call by Mr. Speer to Mr. Webster to see if Sun had made a determination to waive the Statute of Limitations.

November 13, 1974 Telephone call by Mr. Speer to Mr. Webster. Mr. Webster advised that Sun would not waive the Statute.

November 27, 1974 Suit filed.

The first issue to be determined by the Court is to ascertain whether the claims asserted by the Secretary on behalf of the seven former employees were separate and distinct. Sun contends that notice and consideration of Osgood's case, did not constitute notice or consideration by Sun of the cases of the other individuals and any response by Sun with respect to one case did not foreclose a different response to the other individuals.

This Court finds that notice of the claim of Osgood does not impute knowledge or notice to the defendant of the other resultant claims of the other six individuals.

Title 29 U. S. C. § 626(b) provides, in pertinent part:

"'* * * Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion."

The Act was enacted in 1967 for the express purpose of promoting "employment of older persons on their ability rather than age", and prohibiting "arbitrary age discrimination." 29 U. S. C. § 621(b); Burgett v. Cudahy Company, 361 F. Supp. 617 (USDC Kans. 1973).

The primary responsibility for the enforcement of the Act is vested with the Secretary of Labor, who is empowered to undertake appropriate studies (§ 624), delegate responsibilities to other agencies (§ 625(a)), issue appropriate rules and regulations (§ 628), and make investigations (§ 626(a)). The Secretary is also authorized to bring actions to enforce the Act's provisions, thereby preempting an aggrieved individual's right to independently seek relief. 29 U. S. C. § 626(d). Burgett v. Cudahy Company, supra. But first, the Secretary, must heed the terms of 29 U. S. C. § 626(b).

The unambiguous language of the statute, and the holding of the cases construing the statute, place the emphasis on private settlement without formal litigation.

The House Education and Labor Report (H. R. Rep. No. 805, Cong., 1st Sess. 1967; U. S. Code Cong. & Admin. News, p. 2218) said:

"It is intended that the responsibility for enforcement vested in the Secretary * * * be initially and exhaustively directed through informal methods of conciliation, conference, and persuasion and formal methods applied only in the ultimate sense. * * *."

The leading case in discussing the problem of conciliation and the Age Discrimination in Employment Act of 1967 is Brennan v. Ace Hardware Corporation, 495 F. 2d 368 (8th CCA 1974). Commencing at page 378, the Eighth Circuit said:

"We turn now to the specific major issue in this case. *The Secretary argues that the efforts of his compliance officer through the two personal meetings and one telephone call constituted substantial compliance with the voluntary compliance requirements of the Act. We disagree.*

"An integral part of the Act is the express provision allowing the employer or other organization the opportunity to voluntarily comply with its provisions before legal action is initiated. The introductory Congressional findings and purposes set the spirit and standard to be followed in achieving the enacted goals. Section 621(b) reads in part: 'It is therefore the purpose of this chapter * * * to help employers and workers find ways of meeting problems arising from the impact of age on employment.' To achieve the goal of eliminating discriminatory employment practices in relation to age, the Secretary's duties should be seen as aiding also the employer in fulfilling his obligations under the law. In this period in our nation in which governmental regulations permeate many facets of previously unregulated activity, government officials must approach their service with a spirit and an attitude of helpfulness and concern for all persons with whom they deal and not with ambiguity, nonchalance, and heavy-handedness of an all-pervasive federal bureaucracy.

"The Act expressly provides for giving the employer or other organization the opportunity to voluntarily

comply with the requirements of the Act. Section 626(b) reads in part: * * *. *The legislative history of the Act strongly indicates that conciliation, conference, and persuasion must constitute strong, affirmative attempts by the Secretary to effect compliance before resorting to legal action.* The House Report makes this clear by stating:

"'It is intended that the responsibility for enforcement vested in the Secretary by section 7, be initially and exhaustively directed through informal methods of conciliation, conference, and persuasion and formal methods applied only in the ultimate sense. H. R. No. 805, pp. 2213, 2218 (1967).'" (Emphasis supplied)

and at page 375:

"In this case, we think that the compliance officer did not fulfill the affirmative burden of exhaustively employing informal methods to allow the Employer the opportunity to comply voluntarily with the Act. *Instead of actively pursuing resolution of the conflict, the Secretary let the case lay dormant for almost four months and filed this present action.* Specifically, we affirm the District Court's finding that the compliance officer improperly did not inform the Employer that 'back wages' should be paid to Prichard. In order for the Employer to comply voluntarily with the Act, he must know specifically what the Secretary desires him to do in order to reach that result. Persuasion cannot be accomplished if the desired goal is unknown. The Secretary by not informing the Employer that back wages are recoverable under the Act and by later instituting a law suit for such damages is defeating the very purpose of attempting to persuade the Employer to comply with the Act. The Secretary's desires and the requirements of the Act should be clearly explained to the employer or alleged violator."

The Court went on to say "we think that the District Court's finding that the compliance officer did not clearly and affirmatively tell the Employer that the file was in fact being referred to the Secretary for review and possible legal action is not clearly erroneous. The District Court succinctly and perceptively held that "voluntary compliance through conciliation, conference, and persuasion is more likely to be effected when the employer clearly understands that the matter will proceed at a level beyond that of the compliance officer if there is not a voluntary resolution of the dispute."

In connection with the Brennan v. Ace Hardware Corporation case, supra, at page 1 of his Brief in Support of Petition to Set Aside Findings and Recommendations of the Magistrate, the following statement is found:

"With respect to conciliation, as was argued on behalf of the plaintiff at the hearing, plaintiff contends that the case of Brennan v. Ace Hardware Corporation, 495 F. 2d 368 (C. A. 8 1974) was improperly decided."

The unambiguous language of the statute indicates that the emphasis is on private settlement and the elimination of age discrimination without formal litigation. Burgett v. Cudahy Company, 361 F. Supp. 617 (DC D. Kan. 1973).

In Dunlop v. Resource Sciences Corp., 11 EPD ¶ 10,827 (N. D. Okla. 1976), the Court said:

"[A]t no time before suit was filed were defendant's officers, management, or counsel advised (1) that

> Plaintiff had administratively found Defendant in violation of the Age Discrimination Act, or (2) what Plaintiff required of the Defendant to comply voluntarily with the Age Discrimination Act, or (3) that unless Defendant did the things specified by Plaintiff to comply voluntarily with the Age Discrimination Act it would be sued without further notice, nor did Plaintiff (4) request Defendant to bring itself into voluntary compliance with the Age Discrimination Act in regard to his proceeding."

The Court further said in Dunlop, supra, referring to the Brennan case, supra:

> "The District Court found that two personal meetings and one telephone call between a compliance officer from the Department of Labor and the employer along with a four-month interval between the last conversation and the filing of the lawsuit were not sufficient to satisfy the requirements of § 626(b). In affirming these findings the Eighth Judicial Circuit concluded that compliance with § 626(b) is not a rigid test but a program which must be flexible and responsive to the attitudes of the employer. However, the Circuit agreed with the District Court when it found that active pursuit of voluntary compliance required some type of notification to the violator, 1) of what the Secretary desires the violator to do in order to comply, 2) informing the violator that back wages may be recovered, 3) that the file was being referred to the Secretary for review and possible legal action, and 4) that the violator should be given an opportunity to respond 'to the violations in light of a make whole remedy.' Brennan at 375. *In the eyes of the District Court, active pursuit of compliance is not allowing a case to lay dormant for four months.*"

Further it was said in Dunlop, supra:

> "To conciliate means to reconcile, compromise, placate or otherwise satisfy the grievance of the complainant. To attempt conciliation means to take some affirmative action or to make some reasonable effort to resolve the differences. *** Failure to cooperate in an investigation does not relieve the Secretary of his obligation to attempt conciliation.
>
> "In the case of John T. Dunlop v. Sandia Corp., No. 75-150 (D. N. M. 1975) the District Court stated that the burden to conciliate falls on the Secretary.
>
> " 'In order to conciliate meaningfully, the Secretary should demonstrate the validity of its claim notwithstanding the fact that the data is available to defendant in its own files.' "

The Court finds, based on the testimony of J. Dean Speer, Assistant Area Director, Wage Hour, Tulsa, that the plaintiff did not affirmatively comply with the mandate of the Act. The legislative history of the Act strongly indicates that conciliation, conference, and persuasion must constitute strong, affirmative attempts by the Secretary to effect compliance before resorting to legal action. Brennan v. Ace Hardware Corporation, supra. Instead of actively pursuing resolution of the conflict, the plaintiff allowed the case to remain dormant for almost eight months (December of 1973 through July of 1974) and did not, even after the file was returned to Mr. Speer (who did, from his own testimony, some additional checking) contact and meet with the defendant until October of 1974, about one month prior to the limitation running.

The circumstances of each case circumscribe the reasonableness of the conciliation on the part of the Secretary.

This Court is in agreement with Dunlop v. Resource Sciences Corp. and Brennan v. Ace Hardware Corporation,

in finding and holding that plaintiff has failed to conciliate the charges of alleged age discrimination as required by Title 29 U. S. C. § 626(b) and that attempted conciliation is a jurisdictional prerequisite to maintaining this litigation in this Court.

This Court is aware that the rights of individual employees are affected by the actions of the Secretary in carrying out the mandate of the Act, but the circumstance of the case dictate that the Motion for Summary Judgment be sustained.

Turning to the claim asserted on behalf of R. C. Holcomb, he was retired early on September 1, 1971. (Plaintiff's Answers to Defendant's Interrogatories to Plaintiff-Set No. 1, filed February 26, 1975). Defendant, by Motion for Summary Judgment, has raised the question or defense of Statute of Limitations as to any claim asserted on behalf of R. C. Holcomb. Plaintiff maintains that the retirement of R. C. Holcomb constitutes a "continuing violation".

The Act's statute of limitations provides:

> "Any action * * * may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued." 29 U. S. C. § 255, 626(e).

In Dartt v. Shell Oil Company (No. 75-1277, Tenth Circuit, decided July 22, 1976) the Tenth Circuit said:

> "Because of the similarities between the ADEA and Title VII of the Civil Rights Act of 1964, courts sometimes refer to interpretations of provisions in Title VII for assistance in defining analogous sections of the ADEA. Moses v. Flagstaff Brewing Corp., 8 Cir., 525 F. 2d 92, 94; Curry v. Continental Airlines, 9 Cir., 513 F. 2d 691, 693; Goger v. H. K. Porter Co., 3 Cir., 492 F. 2d 13, 15. * * *."

In Cisson v. Lockheed-Georgia Company, 392 F. Supp. 1176 (USDC N. D. Ga. 1975) the Court said in a Title VII case:

> "In the instant case, plaintiff would have this court in effect adopt a rule which has uniformly been rejected elsewhere that the insertion of the word 'continuing' in the EEOC complaint invariably excuses the untimely filing of that complaint. As noted above, a lay-off or discharge does not give rise to a per se claim of continuing discrimination. This court recognizes the general rule that a layman should be given wide latitude in his efforts to envoke the processes provided by Title VII; strict, over-technical application of the procedural intricacies of the Act is not consistent with its remedial purposes. Conversely, when over-liberal interpretations of EEOC complaints would actually frustrate the intent of Title VII, such interpretations should be rejected. Thus, this court rejects the argument espoused by plaintiff herein that whenever the term 'continuing' is inserted in an EEOC complaint, the court and the EEOC should assume that the plaintiff actually desires to raise claims of discriminatory failure to rehire, repromote, or retransfer, rather than the discharge or demotion claim actually asserted. Such a rule would permit the bypass of orderly EEOC procedures whenever a layoff or discharge occurs and would completely frustrate the purpose of Title VII to foster conciliation by the parties rather than judicial confrontation."

See Law v. United Air Lines, Inc., 519 F. 2d 170 (10th CCA 1974) holding denial of employment is not a continuing violation; Terry v. Bridgeport Brass Company, 519 F. 2d 806 (7th Cir. 1975) holding termination through discharge or resignation is not a continuing violation.

In Terry v. Bridgeport, supra, the Court went on to say:

> "• • • to construe loosely 'continuing' discrimination would undermine the theory underlying the statute of limitations. While the continuing discrimination theory may be available to present employees, cf. Griggs v. Duke Power Co., 401 U. S. 424 (1971), even though on layoff, Cox v. United States Gypsum Co., 409 F. 2d 289 (7th Cir. 1969), Sciaffra v. Oxford Paper Co., 310 F. Supp. 891 (D. Me. 1970), we do not think this theory has validity when asserted by a former employee. For such a former employee the date of discharge or resignation is the controlling date under the statute, and a charge of employment discrimination must be timely filed in relation to that date."

In Olson v. Rembrandt Printing Co., 511 F. 2d 1228 (8th Cir. 1975), at 1234, the Court said:

> "The rationale underlying the allowance of actions for continuing discrimination is to provide a remedy for past actions which operate to discriminate against the complainant at the present time. Marquez v. Omaha District Dales Office, 440 F. 2d 1157, 1160 (8th Cir. 1971). See Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1210-12 (1971). Termination of employment either through discharge or resignation is not a 'continuing' violation. It puts at rest the employment discrimination because the individual is no longer an employee.

> "As we noted in Richard, to construe loosely 'continuing' discrimination would undermine the theory underlying the statute of limitations. While the continuing discrimination theory may be available to present employees, cf. Griggs v. Duke Power Co., 401 U. S. 224 (1971), even though on layoff, Cox v. United States Gypsum Co., 409 F. 2d 289 (7th Cir. 1969); Sciaffra v. Oxford Paper Co., 310 F. Supp. 891 (D. Me. 1970) we do not think this theory has validity when asserted by a former employee. For such a former employee the date of discharge or resignation is the controlling date under the statute, and a charge of employment discrimination must be timely filed in relation to that date."

It is apparent from the file that any claim for any alleged violation of the Act with respect to R. C. Holcomb was filed more than three years after Mr. Holcomb was retired and is barred by the applicable statute of limitations provided in the Statute.

Based on all of the foregoing, the Court finds that the Motion for Summary Judgment filed by the defendants should be sustained and the objections to the Findings and Recommendations on file herein overruled.

IT IS, THEREFORE, ORDERED that defendant's Motion for Summary Judgment be and the same is hereby sustained and the cause of action and complaint dismissed with prejudice premised on the following grounds:

1. That this Court lacks subject matter jurisdiction or, in the alternative, that the Complaint fails to state a claim upon which relief can be granted as a result of plaintiff's failure to comply with the statutory directive of attempting to effect voluntary compliance through informal methods of conciliation, conference and persuasion pursuant to 29 U. S. C. § 626(b) before instituting action; and

2. That the applicable statute of limitations, 29 U. S. C. § 225, 626(e), bars any action or relief claimed on behalf of R. C. Holcomb.

IT IS FURTHER ORDERED that the objections filed by the plaintiff to Findings and Recommendations be and the same are hereby overruled.

ENTERED this 3rd day of November, 1976.

/s/ ALLEN E. BARROW,
Chief United States District Judge.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 77-1210 (74-C-474-B)

RAY MARSHALL, Secretary of Labor,
United States Department of Labor,
Plaintiff-Appellant,

v.

SUN OIL COMPANY OF PENNSYLVANIA,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

OPINION.

(Filed February 1, 1979)

Lois G. Williams, Attorney, United States Department of Labor (Carin Ann Clauss, Solicitor of Labor; Carl W. Gerig, Jr., Acting Associate Solicitor, Paul D. Brenner, Attorney, U. S. Department of Labor, and Ronald M. Gaswirth, Regional Solicitor, with her on the brief) for Appellant.

John J. Runzer, Pepper, Hamilton & Scheetz, Philadelphia, Pennsylvania (Nancy J. Gellman, with him on the brief) for Appellee.

Before LEWIS, MCKAY and LOGAN, United States Circuit Judges.

LEWIS, Circuit Judge.

This is an appeal from a judgment of the United States District Court for the Northern District of Oklahoma dismissing a complaint brought by the Secretary of Labor against defendant under the Age Discrimination in Employment Act of 1967 (29 U. S. C. § 621 *et seq.*). Plaintiff has raised two issues in this appeal:

> 1. Whether the Secretary made sufficient efforts to effect voluntary compliance through informal conciliation as required by § 7(b) of the ADEA, 29 U. S. C. § 626(b).
>
> 2. Assuming failure of the Secretary to sufficiently pursue informal conciliation, whether the district court should have stayed proceedings rather than dismiss the complaint.

The factual setting to this action begins in May, 1973, when Emory Osgood notified the Secretary of Labor of his intent to sue defendant under the ADEA for allegedly forcing him to take early retirement because of his age. Dean Speer, a Labor Department compliance officer, met with representatives of defendant in June, 1973 for two hours to discuss the Osgood case. Speer then conducted an investigation concerning possible ADEA violations by defendant with regard to other employees. In December, 1973, Speer notified Robert Webster, a representative of defendant, that remedial action in the form of re-employment or a cash settlement should be taken with respect to Osgood and another former employee, George Sokol. Sokol had not filed a notice of intent to sue, and defendant had not been previously informed that Sokol's case was specifically under investigation. When Webster responded that such remedial measures would not be taken,

Speer advised him that the file would be forwarded to the Labor Department's legal office for analysis and a decision as to further action.

In May, 1974, James Daniels filed a notice of intent to sue defendant in Philadelphia. The Philadelphia compliance officer contacted defendant about Daniels, but later turned the matter over to Mr. Speer in Tulsa.

The Osgood/Sokol file was returned to Speer in July, 1974, with advice and instructions as to additional information to be developed. Pursuant to these instructions Speer furthered his investigation, and on October 23, 1974 Speer and a Labor Department attorney met with Webster. At that time Speer advised Webster of the government's finding that defendant had engaged in a pattern of age discrimination with regard to seven named individuals, including Osgood, Sokol and Daniels. This was the first indication to defendant from Speer that a specific investigation had been conducted with respect to the other four persons alleged to be discriminatees. Speer asked if defendant would agree to extend re-employment and lost wages to the seven individuals, but Webster answered that he did not have enough information about all of them to respond. Webster said he would like to review the matter and would be prepared to discuss it at some later time. The Labor Department officials would not agree to further negotiations, however, unless defendant agreed to waive the statute of limitations which would run with respect to some of the named individuals on December 1.

Defendant refused to consent to the waiver, and the Secretary filed this suit the following month, alleging age discrimination against the seven former employees. The district court sustained defendant's Motion for Summary Judgment and dismissed the complaint with prejudice on grounds that the court lacked subject matter jurisdiction

or, in the alternative, the complaint failed to state a claim upon which relief can be granted as a result of plaintiff's failure to attempt to effect voluntary compliance through informal methods.[1]

I.

The ADEA places primary emphasis on conciliation to resolve disputes. § 7(b) of the statute provides:

> ° ° ° Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

The legislative history of the Act manifests the congressional intent that enforcement be effected wherever possible without resorting to formal litigation. The House Report states:

> It is intended that the responsibility for enforcement vested in the Secretary by section 7, be initially and exhaustively directed through informal methods of conciliation, conference, and persuasion *and formal methods applied only in the ultimate sense.* (Emphasis added.)

H. R. No. 805, 90th Cong., 1st Sess., U. S. Code Cong. & Admin. News 2213, 2218 (1967).

At the October 23 meeting, plaintiff failed to follow this legislative directive by conditioning further negotiations on defendant agreeing to waive the statute of limitations. Defendant had indicated a willingness to continue informal conciliation without the waiver, and over one month was available to that end before the December 1 deadline. Defendant was under no obligation to waive the statute of limitations, and it was reasonable for defendant to require time to review the case histories of the named individuals before formulating a response to plaintiff's demand for reinstatement and lost income. Marshall v. Hartford Fire Ins. Co., D. Conn., 78 F. R. D. 97. By insisting on waiver of the limitations period as a condition to further negotiations, plaintiff prematurely restricted the conciliation process and thus failed to fully exhaust the informal enforcement avenues as contemplated by § 7(b). Brennan v. Ace Hardware Corporation, 8 Cir., 495 F. 2d 368.

1. The court below also ruled that the statute of limitations bars any claim on behalf of R. C. Holcomb, one of the seven named individuals. No appeal has been taken from this ruling, and the dismissal as to Holcomb still stands.

II.

Our consideration of this case, however, does not end with the conclusion that plaintiff failed to fully perform his conciliatory function. The congressional desire that the Secretary "exhaustively" seek informal compliance before resorting to litigation places a heavy burden indeed upon the plaintiff, for an employer can almost always point to some avenue of conciliation which has not been "exhaustively" exploited. Marshall v. Hartford Fire Ins. Co., *supra,* at 104. Were the courts to demand full compliance with this exacting standard upon pains of dismissal, enforcement of the ADEA would be severely hampered. We have previously noted that "[t]he ADEA is remedial and humanitarian legislation and should be liberally interpreted to effectuate the congressional purpose of ending age discrimination in employment." Dartt v. Shell Oil Co., 10 Cir., 539 F. 2d 1256, 1260, *aff'd per*

curiam by an equally divided court, 434 U. S. 99. The drastic step of dismissal in this action is incompatible with the humanitarian nature of the Act.

We are aided here by the recent decision of this court in E. E. O. C. v. Zia Company, 10 Cir., 582 F. 2d 527. *Zia* was concerned with the sufficiency of EEOC conciliation efforts in an action arising under Title VII of the Civil Rights Act of 1964. Title VII contains a conciliation provision essentially identical to that of the ADEA,[2] and interpretations of one provision are useful in cases arising under the other. Dartt v. Shell Oil Co., *supra,* at 1259.

In *Zia,* the EEOC had failed to sufficiently exhaust conciliation possibilities in good faith, and the district court therefore concluded that it was without jurisdiction to grant relief. Remanding to the court below, we held that where there had been only a limited effort at conciliation, the district court nevertheless had jurisdiction over the cause of action. Our opinion then states:

> The inquiry into the duty of "good faith" on the part of the EEOC is relevant to whether the court should entertain the claim, or stay the proceedings for further conciliation efforts, not to its power over the cause. 582 F. 2d at 533.

We likewise hold that in an ADEA case, once there has been significant effort by the Secretary to effect voluntary compliance, if the district court finds that further conciliation efforts are required the proper course is to stay proceedings until such informal conciliation can be concluded. Opportunity for full and exhaustive conciliation is thereby afforded without jeopardizing the injured persons' right of ultimate access to the courts. Such procedure harmonizes optimally with the dual purposes of the statute: "to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U. S. C. § 621(b).

2. Compare 42 U. S. C. § 2000e-5(b) with 29 U. S. C. § 626(b).

In the instant case the Labor Department officials made a substantial initial effort to effect voluntary compliance. In particular, plaintiff informed the defendant of the specific allegations of misconduct and what action was required to comply with the Act. While plaintiff's efforts fell far short of what might reasonably be considered "exhaustive," there was nevertheless a sufficient attempt at conciliation to meet the minimum jurisdictional requirement.

The matter is therefore remanded for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 77-1210
(D. C. No. 74-C-474-B)

JANUARY TERM—February 1, 1979

Before Honorable David T. Lewis, Honorable Monroe G. McKay, and Honorable James K. Logan, Circuit Judges

RAY MARSHALL, Secretary of Labor,
United States Department of Labor,
Plaintiff-Appellant,

v.

SUN OIL COMPANY OF PENNSYLVANIA,
a corporation,
Defendant-Appellee,

EQUAL EMPLOYMENT ADVISORY COUNCIL,
Amicus Curiae.

JUDGMENT.

This cause came on to be heard on the record on appeal from the United States District Court for the Northern District of Oklahoma, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is reversed. The cause is remanded to the United States District Court for the Northern District of Oklahoma for further proceedings consistent with the opinion of this Court.

/s/ HOWARD K. PHILLIPS,
Howard K. Phillips, *Clerk.*

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 77-1210.

JANUARY TERM—March 9, 1979

Before Honorable Oliver Seth, Chief Judge, Honorable David T. Lewis, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, and Honorable James K. Logan, Circuit Judges

RAY MARSHALL, Secretary of Labor,
United States Department of Labor,
Plaintiff-Appellant,

v.

SUN OIL COMPANY OF PENNSYLVANIA,
a corporation,
Defendant-Appellee,

EQUAL EMPLOYMENT ADVISORY COUNCIL,
Amicus Curiae.

ORDER.

This matter comes on for consideration of appellee's untimely petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition is ordered filed as of February 16, 1979.

It is the further order of the Court that the petition is denied by Circuit Judges Lewis, McKay and Logan to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS, *Clerk.*

/s/ ROBERT L. HOECKER,
By Robert L. Hoecker, *Chief Deputy.*